NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Desert Cab, Inc. d/b/a ODS Chauffeured Transportation *and* Paul Lyons. Case 28–CA–199576

February 8, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On June 22, 2018, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Respondent filed a motion to reopen the record and exceptions with supporting arguments, and the General Counsel filed an opposition to the motion, answering brief, and motion to strike.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We deny the Respondent's motion to reopen the record, both because the Respondent has not demonstrated that the evidence it seeks to introduce is newly discovered or was previously unavailable, see Sec. 102.48(c)(1) of the Board's Rules and Regulations, and because the Respondent impermissibly seeks to introduce this evidence to attack the judge's credibility resolutions, see *Hagar Management Corp.*, 313 NLRB 438, 438 fn. 1 (1993), enfd. 55 F.3d 684 (D.C. Cir. 1995). Accordingly, we have disregarded all references in the Respondent's exceptions to the extra-record evidence attached to the Respondent's motion. Having done so, we find it unnecessary to strike the Respondent's exceptions, as the General Counsel requests.

We do not rely on the judge's statement that "Respondent's counsel's proffered facts through his witnesses' multiple 'yes' or 'no' responses are inadmissible as evidence." Answers given in response to leading questions from a party's own counsel are admissible but entitled to "minimal weight." *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977); see Fed. R. Evid. 611(c), Advisory Committee Notes. The judge's error is harmless, however, because he did not exclude any relevant evidence from the record. We also do not rely on the judge's citation to *Cimato Bros.*, 352 NLRB 797 (2008), or *Dickens, Inc.*, 352 NLRB 667 (2008), both of which were decided by a two-member Board, see *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), or his citation to *Hispanics United of Buffalo*, 359 NLRB 368 (2012), a decision that was invalidated as a result of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

The judge found that Desert Cab, Inc. and On Demand Sedan, Inc. are a single employer. The complaint does not so allege, and whether counsel for the General Counsel ever put the Respondent on notice at the hearing that she was pursuing a single-employer theory is open to question. Nevertheless, the Respondent did not sufficiently except to the judge's single-employer finding under Sec. 102.46(a) of the Board's Rules and Regulations. On this basis, we adopt the judge's finding. The Respondent also did not sufficiently except to the judge's finding that employee Paul Lyons engaged in protected concerted activity. In adopting this finding, however, Chairman Ring and Member Kaplan find it unnecessary to rely on the judge's statement that wage discussions are "inherently concerted" or the cases the judge cited in support of that statement.

There are no exceptions to the judge's finding that the Respondent unlawfully applied its "unprofessional conduct" rule to restrict Lyons in the exercise of his Sec. 7 rights. Under extant precedent, when an employer violates Sec. 8(a)(1) by applying a rule to restrict the exercise of Sec. 7 rights, the Board orders the employer to rescind or revise the rule—typically in accordance with *Guardsmark, LLC*, 344 NLRB 809, 812 & fn. 8 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007), which involved facially unlawful rules—even though the rule is lawful on its face. See, e.g., *Hitachi Capital America Corp.*, 361 NLRB 123, 125–126 (2014); *Cayuga Medical Center at Ithaca, Inc.*, 365 NLRB No. 170, slip op. at 2 (2017) (omitting *Guardsmark* remedy). For institutional reasons and in the absence of exceptions to the underlying violation, Chairman Ring and Member Kaplan apply this precedent here, but they would be willing to reconsider it in a future appropriate case.

Member McFerran notes that while the Board does order employers to rescind an unlawfully applied rule, it generally also allows them an opportunity to revise the rule by providing lawfully worded language. See *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 1–2 (2018); *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. 7–8 (2016); *Hitachi*, above; *Albertson's, Inc.*, 351 NLRB 254, 259, 262 (2007). See also *Cayuga Medical Center*, above, 365 NLRB No. 170, slip op. at 2, 44 fn. 59 (allowing the respondent an opportunity to "rescind *or revise*" an unlawfully applied rule in a case where the record showed the rule was relatively easy to republish) (emphasis added). The Board has also given employers cost-saving opportunities for republishing identified in *Guardsmark,* above, 344 NLRB at 809, 812 fn. 8.

Because this case turns on alleged misconduct that is part of the res gestae of Lyons' protected concerted activity, the proper inquiry is whether Lyons lost the protection of the Act in the course of that activity. Accordingly, neither the *Wright Line* mixed-motive standard nor the *Burnup & Sims* mistaken-belief standard applies, and we do not rely on those portions of the judge's analysis. See, e.g., *Public Service Company of New Mexico*, 364 NLRB No. 86, slip op. at 7 (2016). For the reasons stated by the judge, we adopt his finding that nothing Lyons included in his protected concerted Facebook posts caused him to lose the Act's protection. Moreover, we find that Lyons would not have lost the protection of the Act regardless of whether his Facebook posts were public or private, so we find it unnecessary to rely on the judge's finding that the posts were private. See *Triple Play Sports Bar & Grille*, 361 NLRB 308, 312 (2014) (finding Facebook posts protected even when some of the participants' privacy settings were unknown), enfd. mem. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015).

[2] We amend the judge's remedy to provide that the Respondent shall file a report with the Regional Director allocating backpay to the appropriate calendar years as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). We shall modify the judge's recommended Order in accordance with the modified remedy and to conform to our standard remedial language. We shall substitute a new notice to conform to the Order as modified.

ORDER

The Respondent, Desert Cab, Inc. and On Demand Sedan, Inc., a single employer, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activities.

(b) Applying its unprofessional conduct rule to prohibit employees from engaging in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Paul Lyons full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Paul Lyons whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Paul Lyons for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to Paul Lyons' unlawful discharge, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Rescind or revise the unprofessional conduct rule.

(g) Furnish employees with an insert for the current Causes for Termination policy that (1) advises that the unprofessional conduct rule has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees a revised Causes for Termination policy that (1) does not contain the unlawful provision, or (2) provides lawfully worded provisions.

(h) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 24, 2017.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 8, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT apply our unprofessional conduct rule to prohibit you from engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Paul Lyons full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Paul Lyons whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Paul Lyons for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Paul Lyons, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind or revise our unprofessional conduct rule.

WE WILL furnish you with an insert for the current Causes for Termination policy that (1) advises that the unprofessional conduct rule has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute a revised Causes for Termination policy that (1) does not contain the unlawful provision, or (2) provides a lawfully worded provision.

DESERT CAB, INC. AND ON DEMAND SEDAN, INC., A SINGLE EMPLOYER

The Board's decision can be found at www.nlrb.gov/case/28-CA-199576 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Elise F. Oviedo, Esq., for the General Counsel.
Robert A. Winner, Esq., of Robert Winner, Ltd., for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. Paul Lyons, an individual, (the Charging Party or Lyons), filed the original charge in this case on May 26, 2017.[1] The Regional Director at Region 28 issued the complaint on August 8 (complaint), and the Respondent Desert Cab, Inc., doing business as ODS Chauffeured Transportation (Desert Cab) and On Demand Sedan, Inc. (ODS)(collectively referred to as Respondent or Employer), answered the complaint on August 24, generally denying that Lyons' discharge from Respondent was due to his protected concerted activities.

This case involves the Respondent's sudden discharge of Charging Party Lyons on May 24 after he made two private Facebook postings on May 21 to his friends-only group criticizing Respondent's client and Respondent's management due to Respondent's recent change in the terms and conditions of employment which included many employees at Respondent and one manager friend. Among other things, the Respondent denies that Lyons' Facebook comments about the Respondent and its client were private and seen only by a small group of Lyons' friends and acquaintances. Respondent also denies that Lyons was engaged in protected concerted activities of any kind in May 2017, and argues that even if Lyons was engaged in protected concerted activity, his termination was unrelated to any protected concerted activity.

This case was tried in Las Vegas, Nevada, on September 26, 2017. Closing briefs were submitted by the General Counsel and the Respondent on November 7, 2017, and a supplemental

[1] All dates in 2017 unless otherwise indicated.

brief from the General Counsel was filed on May 7, 2018.[2] On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it has been a corporation with an office and place of business in Las Vegas, Nevada.[4] (Tr. 9; GC Exh. 1 (c) at 1-2, GC Exh. 1(e) at 1-2.)[5] The Respondent has been engaged in providing transportation services to individuals and other businesses. Respondent further admits, and I also find that in conducting its operations during the 12-month period ending May 26, Respondent derived gross revenues in excess of $500,000 and it purchased and received at its Las Vegas facility good in excess of $50,000 directly from points outside the State of Nevada. (Tr. 8–10.) I further find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's General Business Operations

Respondent employs somewhere between 150–200 drivers in its business. A fleet chauffeur driver (fleet driver or chauffeur) handles the charter and limo walk-up business that Respondent has staging rights at different Las Vegas hotels such as The Bellagio, The Excalibur, The Cosmopolitan, and The Luxor.

The Respondent is managed by Ed Gehres (Gehres), its general manager and chief operations officer since September 19, 2016. (Tr. 278.) Gehres reports directly to Respondent's owner and Chief Executive Officer Brad Balaban. (Tr. 89.)

Michael Lowery (Lowery) has been with the Respondent since 2002 when he started as a chauffeur and since 2004, Lowery has been a training and performance manager at Respondent who has supervised chauffeurs from time-to-time and participates in management discussions recommending discipline and termination of employees. (Tr. 89.) Rene Martinez (Martinez) is the operations manager at the Respondent in 2016–2017. (Tr. 89.) Lisa Monteiro (Monteiro) has worked with the Respondent since 2001 and is its communications, dispatch, and call center manager supervising approximately 30 employees with the direct authority to hire, terminate, discipline, and promote employees. (Tr. 89.)

Respondent Desert Cab, Inc. and Respondent On Demand Sedan, Inc. (ODS) are referred to as "sister" companies located in the same building and share the same postal address, the same parking lot, and use the same maintenance team and mechanics for their vehicles. (Tr. 182.) ODS also uses Desert Cab's supervisors who respond to accidents at both companies and Desert Cab handles all of its own and all of ODS' workers compensation claims and related issues. (Tr. 182, 185, 193.)

"Staging" occurs when a fleet driver takes their vehicle to a pre-assigned hotel. Usually, the Respondent has contracts with various hotels and therefore has "staging" rights for their vehicles to be parked at a hotel ready to pick up hotel guests or people walking the Las Vegas Strip. This allows Respondent to put its limousines prominently in the front of the hotel for either a walk-up passenger or for a hotel guest who has made a reservation for a limo. (Tr. 197, 202.)

A "starter" is a Respondent employee whose job is to monitor those curbs in front of the hotels that Respondent has staging contracts with such as at Bellagio, Excalibur, the Cosmopolitan, and Luxor. A starter can also be a supervisor too. Basically, the supervisor starter enforces Respondent's dress policy, they make sure that rides are recorded, such that if a Respondent limo driver takes a ride from the door, this gets recorded and put into a computer tablet. Before electronic tablets were used in late 2016 or early 2017, this information was written on a piece of paper and that was called a starter's log where they would record similar information. A portion of the starter's job is to make sure that the limo driver would not for-

[2] At the hearing, I granted the General Counsel's motion to amend the complaint at par. 4 to add allegations to the unlawful discharge claim to allege that Respondent maintained an over-broad and discriminatory rule and that Respondent discharged Lyons, among other reasons, because Lyons violated the over-broad and discriminatory rule. Tr. 9–14; GC Exh. 1(c) at 2–3. On December 14, 2017, the Board issued its decision in *The Boeing Company*, 365 NLRB No. 154 (2017), which made retroactive the application of a new legal standard to pending cases alleging that facially neutral workplace rules are unlawful. On April 24, 2018, I granted the parties the opportunity to identify any need to supplement the record and to file supplemental briefs. On May 7, 2018, the General Counsel opined that the record was complete without reopening the record, and she filed a motion to amend the complaint again at par. 4. The Respondent did not file a brief opposing the General Counsel's motion and/or seeking to reopen the record. I find that the record is complete, and I grant the General Counsel's unopposed motion to amend the fully litigated complaint allegations (the General Counsel's 2nd Motion to Amend) regarding the Respondent's unprofessional conduct rule in its Causes for Termination policy, subsection f. pertaining to employee "gross misconduct or unprofessional conduct towards management and staff." GC Exh. 2. The Respondent's application of this rule against Lyons remains in dispute and is identified in amended pars. 4(d)(1) and (2) of the complaint and described in detail in this decision at Section III.

[3] The transcript in this case is mostly accurate, but I correct the transcript (Tr). as follows: Tr. 74, line (l.) 21: "Holyfield" should be "Gehres;" Tr. 91, l. 10: "boast" should be "Facebook posts;" Tr. 96, l. 21: "eventful" should be "uneventful;" Tr. 105, l. 16: "here" should be "hear;" Tr. 231, l. 15: "relevant" should be "irrelevant;" Tr. 239, l. 12: "mans" should be "means;" Tr. 251, l. 24: "78" should be "7-8;" Tr. 270, l. 7: "non-statutory" should be "statutory;" Tr. 275, l. 23: "can authenticater" should be "cannot authenticate;" and Tr. 275, l. 24: "he's not a statutory employee" should be "he's a statutory supervisor in 2013."

[4] Desert Cab, Inc. (Desert Cab) and On Demand Sedan, Inc. (ODS) are sister companies who reside in the same building at the same address in Las Vegas. Both companies share the same parking lot and use the same vehicle mechanics. They also share the same Desert Cab supervisors who investigate accidents at both companies and file workers compensation claims for both companies. In addition, the same lawyer represents both Desert Cab and ODS in this case. Tr. 9, 182, 185.

[5] Abbreviations used in this decision are as follows: "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief and "R. Br." for the Respondent's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

get to write in the trip sheet and a starter would also call in the ride to dispatch as soon as a driver gets it.

One of Respondent's non-hotel clients is Sundance Helicopters (Sundance), a helicopter tour company also located in Las Vegas near the Strip and Reno Street. (Tr. 197.) Respondent provides shuttle work for Sundance where Respondent's drivers shuttle tourists to and from Sundance from the Strip's hotels. A Sundance driver is like a shuttle driver. (Tr. 198.) These Sundance helicopter tours vary in length and can last from a quick 30-minute trip up and down the Strip, to up to 4 hours if they are going to the Grand Canyon.

1. Lyons as a Chauffeur, Road Supervisor, and Long-Term Employee Since 2005 Through May 2017

Lyons was hired as a fleet chauffeur driver at Respondent and worked at Respondent from August 1, 2005 until May 24, 2017. (Tr. 197.) During that time period from approximately 2006 through September 2015, Lyons also worked as a combined chauffeur and road supervisor for Respondent with added duties that included disciplining other drivers and mentoring and assigning work. (Tr. 197–198, 227–228.) Lyons opined that Respondent made Lyons a road supervisor in less than 2 years because Respondent believed that Lyons had leadership qualities and wanted him to be in charge of the drivers on swing shift because Respondent knew that most of the swing shift drivers would listen and follow Lyons as a road supervisor. (Tr. 231–232.)

Over this nearly 9-year period as a road supervisor, Lyons was responsible for directing employees and telling them what to do and they would get disciplined or written up if they did not follow what Lyons instructed. (Tr. 179.) Respondent road supervisors were Respondent's "eyes and ears" on the road so if they saw a driver do something wrong, the road supervisor would coach the driver or write-up discipline against them. (Tr. 178–179.)

Lyons' authority as a road supervisor included pulling other limo drivers off the curb while staging at a hotel if the driver was causing a problem such as getting into arguments or if they were getting into a situation called frontloading, which is when a driver goes out of turn.[6] Lyons further explains that frontloading is a big problem because drivers will get in fistfights over it.

Lyons further recalled that he would issue a warning if he saw a driver frontloading and if he saw the same driver do it again. Lyons, as road supervisor, had authority to pull a driver off the door and Lyons would also make sure and talk to all the doormen at the door, and make sure the offending driver was not loaded again.

Lyons also estimated that he did not always report these bad drivers to Respondent management because he had discretion to determine how much weight to give to an offending driver situation. Lyons specifically recalled that he actually wrote up Lowery and recommended discipline for Lowery as a driver and another time he wrote-up driver Dan Holmgren (Holmgren) and a few others. (Tr. 255–257.) As a result of Lyons' recommendations, Lowery was admonished in the office by a Respondent manager. Holmgren was not admonished, and the other drivers were written up and one was suspended. Id.

Another duty of a road supervisor is that if there is any type of accident, no matter how inconsequential, a road supervisor comes out and he is an accident investigator and makes Respondent's insurance claims and the drivers involved would have to fill out a form even if they had just bumped fenders and there was no damage. (Tr. 234, 257–258.)

Lyons normal workweek before November 2016 or January 2017, like other drivers, was in excess of 40 hours per week.

Lyons further opined that he had never been disciplined for attendance issues and that he missed 3 or 4 days of work in 2016 and that he had no absences for 2017 before he was terminated on May 24. (Tr. 257–258.)

In September 2015, Lyons stopped being a road supervisor with Respondent because Respondent ended its program of having driver road supervisors. (Tr. 197.) The Respondent's road supervisor program was soon followed by Respondent's group leader program for some of Respondent's highly regarded drivers, like Lyons, who were asked by Respondent to act in this new capacity and mentor other drivers.[7] Lyons decided not to be a group leader after all of his years as a road supervisor. (Tr. 227–228.)

Lyons opined that most of his work has been as a fleet chauffeur for Respondent and that he filled in only occasionally as an on-call driver, when Respondent needed help with its Sundance shuttle work. Lyons, like many other chauffeurs at Respondent, did not like working as a Sundance shuttle driver because drivers at Sundance earned significantly less wages driving the Sundance shuttle than driving the fleet work at hotels because Sundance shuttle passengers tipped less than limo passengers.

As stated above, frequently many of Respondent's drivers, including Lyons, complained to Respondent management and other drivers that they did not like having to drive the Sundance shuttle. (Tr. 182.) Monteiro learned from dispatchers and she acknowledged that chauffeur drivers did not like driving the Sundance shuttle and many drivers complained about being assigned to the Sundance shuttle even prior to April 2017. (Tr. 36–39, 64–69.)

Prior to his discharge, Lyons was never disciplined for any of his personal complaints about the Sundance shuttle work.[8]

[6] The limo drivers all sit in a queue and they are in turn and if one driver comes up such as when it's really busy and cuts in the line and takes a ride ahead of the other drivers—that is frontloading. Tr. 232–233.

[7] I find that Respondent would not have offered this group leader position to Lyons in 2015 or 2016 unless the Respondent held Lyons in high regard and valued his continued judgment. I further find that Lyons had not been a "problem" employee subject to prior discipline before May 24. See i.e., GC Exh. 6 (Respondent acknowledges that Lyons had no prior discipline and Lyons was not "given a verbal warning, written warning and/or was suspended prior to this [May 21 termination incident]"). Id.

[8] In September 2015, after Respondent had abandoned its road supervisor program, Lyons commented over his car radio that Sundance shuttle passengers were "deadbeats" who do not pay tips and Lyons was coached by a supervisor about not making these comments over the Respondent's radio channel. (Tr. 169–171.) These coaching moments at Respondent, however, are not considered by Respondent to be a form of discipline like verbal or written warnings, suspension or termination, and this September 2015 incident did not result in any discipline against Lyons nor was it cited or mentioned in Lyons' termi-

On October 9, 2016, Lyons complained to his manager Rosa at Respondent that with his seniority, he did not think he should have to work 3 days in a row at Sundance. Rosa and Lyons worked out an agreement that Lyons would be able to work on the fleet side at least on a Friday or Saturday, which are the most lucrative nights for earning tips, and the other nights Rosa could go ahead and put Lyons on the Sundance shuttle. (Tr. 246–247; R. Exh. 7.)

2. Chauffeur Fleet Work Versus Sundance Shuttle Work

One significant difference between limo fleet drivers and Sundance shuttle work has to do with the different types of passengers using the two different services. Sundance shuttle drivers are paid per passenger while fleet chauffeur drivers received a minimum commission base pay rate of $8.25 an hour plus tips. (Tr. 131–133.) Sedan rates are 23 or 24 percent plus tips and larger vehicles like limos are a lower percentage plus tips because the hourly rate for them is higher than a sedan. (Tr. 132.) Chauffeur drivers prefer to drive straight charter and walk-up work which is in contrast to the Sundance or airport shuttle work. (Tr. 142.)

It was common knowledge at Respondent that the Sundance passengers do not tip as well as fleet driver passengers. As soon as a driver got their keys and were assigned to the Sundance shuttle, they did not make as much money as if assigned to be a limo fleet driver for that day. As a result, many Respondent drivers would complain to dispatchers about Sundance, call in sick, and do other things like just not showing up for work to avoid driving as a Sundance shuttle driver. (Tr. 121–122, 198, 201, 245.)

In addition, the reputation for some of Sundance's tourist customers from Australia and other places outside the United States is that they do not tip drivers like other tourists do and these tourists paid Sundance shuttle drivers much less in tips than earned as fleet chauffeurs servicing only hotel guests. (Tr. 121.) Specifically, the drivers would all frequently joke with the other drivers about the saying: "Cheers, mate" because a significant portion of the passengers that they pick up for Sundance were from Australia, and instead of giving the drivers a tip, the Australian passengers would just say: "Cheers, mate." So the drivers would always joke around with each other and say to each other: "Cheers, mate" to acknowledge that they would soon or had just been stiffed by shuttling Sundance passengers who paid no tips. (Tr. 198–199.)

By 2016, it had gotten so bad for Respondent that it stopped scheduling Sundance drivers ahead of time on the drivers' schedules. (Tr. 200–201, 245.) Consequently, Respondent stopped giving advance notice of Sundance work to its drivers so a driver would not know they were assigned to drive the Sundance shuttle until they actually showed up at work on a particular day and picked up their keys. In this situation, Respondent's dispatcher would say: "You're assigned to Sundance. I have a printout for you," or "Go to Sundance and you have returns." (Tr. 200.)

3. Respondent's Policy Change of Reduced Hours for Drivers Late 2016-Early 2017

Prior to November 2016, many of Respondent's fleet drivers worked more than 40 hours per week. Beginning in either November or December 2016 or January 2017, fleet drivers at Respondent had their hours reduced and some of the drivers were reduced to 5 days, 8 hours a day and the other drivers were reduced to four 10-hour workdays. (Tr. 199–200.) Because Respondent changed all the drivers' hours across the board, Lyons' hours were also reduced to 4 days a week at this time. (Tr. 200.) Chauffeurs were generally assigned to the Sundance shuttle at this time approximately 1–2 days a week. (Tr. 183.)

Also, in January 2017, Respondent began its program asking chauffeurs to use electronic tablets and their cellphones to enter pre-costing trip data for Respondent's accounting department. (Tr. 172–177.)[9]

4. Respondent's New No Staging at Sundance Policy Change in April 2017

Beginning in April 2017, Respondent changed its staging policy for Sundance shuttle work for all its drivers so instead of being able to stage up at any of the hotels, while on Sundance shuttle duty, drivers were no longer allowed to stage at hotels in the interim while waiting for Sundance passengers to return to Sundance. Instead, the Sundance shuttle drivers were sent directly to Sundance where they were required to sit and wait sometimes hours and drivers soon became aware that it would just basically be that: "You were on Sundance all day if you were assigned to Sundance." (Tr. 39, 201.) This no staging while on Sundance shuttle duty was created by Gehres and is referred to hereafter as the No Staging at Sundance Policy. (Tr. 111–114.) Lyons was surprised to hear that Respondent had created the No Staging at Sundance Policy. (Tr. 247.)

Before this No Staging at Sundance Policy, if a driver was assigned the Sundance shuttle, they were told to be at Sundance at a certain time—for example 8 p.m.—or the Respondent

nation. (Tr. 163, 187–188; GC Exh. 6.) In contrast, Respondent's closing brief argues that Lyons was a "sub-par" employee who had a number of prior disciplinary incidents including abusing Respondent's leave policy, insubordination, inefficient billing, and having a number of negative marks in his personnel file prior to May 2017. See R.Br. 6, 9–10.

[9] Despite not being disciplined about it and it not coming up in his termination meetings about Lyons in May 2017, Lowery makes reference to Lyons being a "sub-par" employee based on the early results of Respondent's new tablet/cellphone pre-costing procedure saying that Lyons was at about 30 percent and the least efficient driver in the company. Tr. 172–177. I reject this testimony as it was not considered or mentioned by Respondent in terminating Lyons and I find it is evidence of Lowery's animus against Lyons. Lowery also mentioned that he had a disagreement with Lyons in April 2017, about pricing a ride and Lowery opined that Lyons had a "bad attitude" Tr. 168–169, 177–178. Neither of these comments by Lowery about Lyons made it to the May 2017 termination meeting or Lyons' termination notice. I also find that these matters were not considered by Respondent when it terminated Lyons in May 2017, and they are further evidence of Lowery's animus toward Lyons. Finally, Lowery mentions that Lyons called in sick a lot so he could get out of driving the Sundance shuttle but, once again, there is no evidence to support this and Lyons denies that he abused his leave at Respondent or that he was ever disciplined for excessive absences. Tr. 183. I find this is further evidence of Lowery's false statements and animus toward Lyons.

would hand the driver a sheet that would have the pick-ups for passengers that were going to Sundance, and they would have a specific pick-up time. (Tr. 201–202.) Thus prior to April 2017, a driver could earn more revenue for the Respondent and the driver and go stage at the hotels and be available for walk-ups, or for reservations, before returning to Sundance at a specific time. (Tr. 36–39, 201–202.)

By early May, this new No Staging at Sundance Policy also caused drivers to further complain every day to each other, 5–8 drivers at a time, and 30–40 drivers in total, while sitting idle at Sundance. (Tr. 133–134, 202–203.) They complained about having to be sent to Sundance 3 hours early to wait for Sundance passengers to return from a flight with no ability to stage in the interim. (Tr. 202.) Lyons specifically complained about the new policy to other drivers and drivers Charles D'Ambrosia and Nathaniel Kaviti complained directly to General Manager Gehres about having to work the Sundance shuttle once the No Staging at Sundance Policy was created. (Tr. 136.) Gehres admits that "Sundance is a constant topic of concern" among Respondent's drivers as almost all of them complained about having to drive the Sundance shuttle because they would make less money there. (Tr. 111–112, 119, 135.)

Five–eight drivers get assigned to Sundance each day by the Respondent to cover the Sundance shuttle. This new No Staging at Sundance Policy also had a significant effect on Respondent's drivers because every time that a driver was now assigned to the Sundance shuttle, they basically made significantly less money as a driver that day due to the lower tips paid by Sundance shuttle passengers and primarily due to the added downtime where drivers would be sitting idle rather than staging while waiting for Sundance passengers to return from a flight. (Tr. 202.) Therefore, by early May, it was not as much an issue for drivers being on Sundance shuttle duty *during a part of that day*, it became an issue of being there *all day*. (Tr. 39.)

Martinez was the direct supervisor of Lyons in April and May 2017, and Martinez was in charge of all of Respondent's operations as well as supervisor over all chauffeurs and shuttle drivers at Respondent as it did not have a chauffeur supervisor in place at this time. (Tr. 137.)

5. Events of May 2017

On May 5, in response to the Respondent's new No Staging at Sundance Policy, Lyons was in the lobby at Sundance with approximately 7–8 drivers and the discussion among the drivers was that it was not a smart policy for the Respondent to send over 7–8 limos to sit idle for 3 hours while the hotels were calling for limos at locations where Respondent had staging rights especially on a busy fight night and there was a shortage of available limos at these hotels. (Tr. 204–205, 251–252.) Specifically on May 5, Lyons had received a text message from at least one Respondent starter, Glenda Bescounts at the Bellagio, asking Lyons where he was at and why he was not at the Bellagio where limos were needed. (Tr. 205.)

About 15 minutes later, Lyons, as Respondent's most senior driver of the 7–8 drivers' group, sent two text messages to Respondent's managers Martinez at 6:56 p.m. and Gehres at 7:02 p.m., respectively, on behalf of all of the 7–8 limo drivers sitting at Sundance upset with Respondent's No Staging at Sundance Policy. (Tr. 203–205, 241–242, 251–252.) The texts were virtually identical and informed Respondent's two managers that Respondent's drivers had a problem with Respondent's new No Staging at Sundance Policy as all the drivers had complained about the new policy and Lyons asked the managers for a reply. (Tr. 99; GC Exh. 7(b) and GC Exh. 7(a).)

Each May 5 text contained a photo taken by Lyons at Sundance with approximately 7 or 8 limos sitting idle in Sundance's parking lot and contains the following statements and question:

> [Martinez and Gehres], it's a limousine convention at Sundance Helicopters. We are sitting here for 3 hours on a Friday night (on a fight weekend) before we do anything. Can we get a little common sense here? – [Paul Lyons].[10]

(Id.)

At no time did any of the two managers respond directly to Lyons for his two May 5 texts. (Tr. 99, 101–102, 203, 244.)

Lyons opined that the only thing that he was trying to accomplish with these texts and later with his private Facebook posts after the May 5 texts went unanswered, was to point out to Respondent's management and fellow employees that "common sense was to not be sent over to Sundance to sit for three hours; to be able to cover the hotels so we can increase the revenue of the—of our [Respondent's] business, and also, our income as drivers." (Tr. 226, 242–243, 248–249.)

On May 21, out of frustration after not receiving any response from Respondent's managers to his May 5 texts, and once again at Sundance with other drivers sitting idle due to Respondent's No Staging at Sundance Policy, Lyons again complained for all drivers about the No Staging at Sundance Policy by making two private posts on his personal Facebook page to his friends-only group under his Facebook handle of Paul Lyons. (Tr. 206.) Consequently, only Lyons' friends on Facebook could see his postings rather than the general public, as his Facebook account has always been a private friends-only account. (Tr. 206–207.) Lyons' Facebook friends include 3–4 Respondent employee drivers, a couple of dispatchers, and other non-management employees, some former employees and Lyons' friend—Manager Monteiro.

The first private post by Lyons on May 21 occurred at approximately 5 p.m. when Lyons posted a photo he took at that time of the Sundance lobby with a commentary saying: "Hanging out at the Morgue. We are sent here to sit around for three hours for no reason." (Tr. 207; GC Exh. 4(a) – (c).)

Lyons' first private post resulted in Respondent employees' reactions liking the post from Hannah Pompa, a Respondent dispatcher employee, Dante Depree, a driver, Mykle HoNda [Slava], another employee at Respondent, Aristeo Nicolas Canales, a dispatcher, Amy Buckwalter, a Respondent reservationist, and Elena Rojabi, another driver. (Tr. 208; GC Exh. 4(a) – (c).)

Lyons explains that his first May 21 posting was private and

[10] The text to Gehres was identical to the text to Martinez except at the end of the text to Gehres there was the added "-Paul Lyons" which specifically identified Lyons as the sender of the text. GC Exh. 7(a).

only seen by his 6–7 friends on Facebook and that he made this post to call attention to the problem with the No Staging at Sundance Policy which significantly reduced the income of Respondent's drivers. Lyons further explained that his Facebook settings and posts were set to "private" and only his friends could view them. (Tr. 209.)

Lyons also admits that he was texting on May 5 and posting to his Facebook friends on May 21 as a group activity on behalf of all Respondent drivers who have to sit for 3 hours at Sundance and do nothing when they could be earning revenue staging during that time. (Tr. 226.) As a result, I further find that Lyons use of the word "We" in his May 21 posting is evidence of his concerted activity with other Respondent driver employees rather than a solo act by Lyons for himself alone. (See Tr. 225–226.)

Later, on May 21, at approximately 11 p.m., Lyons again posted on his friends-only private Facebook page account this time a photo/commentary he created showing the front of Sundance with its Sundance Helicopters sign lit-up and his comment: "When its [siq.] truly a crappy day at work and there is nothing you can do about it." (Tr. 208; GC Exh. 5(a)-(c).)

On May 21, Lyons' second private Facebook posting at approximately 11 p.m. resulted in Respondent employees' reactions to liking the post from Respondent employee dispatcher Hannah Pompa, about 4 times, Mackenzie Rose Espiritu, twice, current driver Ken Amtman, twice, who also commented that he knows the feeling and liked the post, Anthony Guilla, a current driver at the time who liked the post, and Kevin Savage also known as Lucky Devilan, also commented. (Tr. 209.) Those employees who posted "likes" to Lyons' posting included driver Ken Amtman, Aristeo Nicolas Canales, a dispatcher, and Amy Buckwalter, a reservationist. (Tr. 76; GC Exh. 5(a) – (c).)

Lyons has also been Facebook friends with Respondent Manager Monteiro for 6 or 7 years. Since 2011, Monteiro works in Respondent's office at Respondent as its call center manager and Lyons has known Monteiro for 10–11 years. (Tr. 209, 213–214.) Lyons' two May 21 private Facebook posts also went to Monteiro as one of Lyons' private Facebook friends and she saw them that evening. (Tr. 42, 45.)

Monteiro did not respond on Facebook or speak to Lyons about any of his May 21 Facebook posts referenced above before Lyons' May 24 termination meeting at Respondent though she was present at Lyons' termination meeting as referenced below. (Tr. 209.) Lyons is not Facebook friends with Lowery or Gehres. (Tr. 155, 213.) Monteiro did not post any comment or actively respond to any of Lyons' May 21 Facebook postings.

Manager Lowery opined that Lyons' May 21 Facebook postings expressed Lyons own concern and the concern of all Respondent drivers that it was not beneficial to drivers to drive the Sundance shuttle because they, the drivers, "don't make money. They don't have an opportunity, to make money because they [Sundance shuttle passengers] do not tip…." (Tr. 178.)

Manager Lowery also wrongly believed that Lyons' two private Facebook postings "were public" and "could impact [Respondent's] business with [Sundance]." (Tr. 188.) Gehres also wrongly believed that what made Lyons complaints about Sundance different than other drivers who frequently complained about working the Sundance shuttle was that Lyons' two May 21 Facebook postings were done in a public forum that specifically called out one of Respondent's clients. (Tr. 128, 288.) I reject this as untrue. The two May 21 posts were private friends-only Facebook postings seen only by Lyons' Facebook friends and not public postings.

On May 22 or 23, Monteiro saw Lyons' two May 21 private Facebook postings and she told other Respondent managers at a May 23 management team meeting about them. (Tr. 90–91, 155–156.) Present at this management meeting were Monteiro, Lowery, Martinez, and possibly Gehres at some point as Gehres did not recall seeing the two May 21 postings at the May 23 meeting but thought he saw them before Lyons was terminated on May 24. (Tr. 91–93, and 157.) Specifically, Monteiro informed the group that Lyons had made derogatory comments about one of Respondent's clients online. (Tr. 156.)

Martinez asked Monteiro to send him Lyons' two May 21 Facebook postings. (Tr. 54–55.) Monteiro recalls sending copies of the two May 21 private Facebook postings to Respondent Manager Martinez.[11] Monteiro thought the May 21 private Facebook postings were badmouthing Sundance and that they reflected badly on Respondent, so she took screenshots of both the May 21 private Facebook posts she had received from Lyons and sent them via email to Respondent's Manager Martinez. (Tr. 54–57) Lyons was surprised that his friend Monteiro took his two private May 21 postings and turned them over to Respondent's management.

Monteiro discussed Lyons' two May 21 Facebook posting at the management meeting and she sent her screenshots of the two postings from Lyons to Martinez and this resulted in Lyons' termination. (GC Exhs. 4–6.)

Gehres delegated his decision-making authority and specifically authorized Martinez or Lowery the decision whether or not to discharge Lyons for making his two May 21 Facebook postings.[12] (Tr. 93, 95–97, 129–130.) Later, on May 23, Respondent's management team decided to terminate Lyons for making two derogatory comments publicly about Respondent's client Sundance in his two May 21 Facebook postings and Lowery prepared Lyons' termination notice which makes no reference to any prior discipline against Lyons and only cites Lyons' two May 21 private Facebook postings as the reason for Lyons' termination. (Tr. 167, 183; GC Exh. 6.) Lowery prepared Lyons' termination notice and met with him on May 24 for his termination from Respondent. (Tr. 165–166.)

Monteiro admits that there were many drivers who complained about having to drive the Sundance shuttle before the new April 2017 No Staging at Sundance Policy because Sun-

[11] The Counsel for the General Counsel requested copies of Monteiro's May 22 or 23 email response to Martinez as part of her subpoena requests but the Respondent did not produce these emails despite being specifically requested by the General Counsel with no explanation why Respondent did not produce the email(s). Tr. 18, 55.

[12] Only Gehres mentioned that he met alone with Martinez and Lowery on May 23 after the managers' meeting and had a side meeting with the two other managers. Tr. 92. I reject this testimony as untrue and unconfirmed as Lowery did not confirm this side meeting and Martinez did not testify.

dance shuttle passengers did not tip and after the No Staging at Sundance Policy because there was significant downtime working the Sundance shuttle and just sitting idle in Sundance's parking lot all day.[13] (Tr. 37–39, 64–66.)

Gehres admits that Lyons' two May 21 private Facebook postings had no negative effect on Respondent or Sundance as they only criticized Sundance and Sundance never commented to Gehres or anyone else at Respondent about Lyons' two postings. (Tr. 289.) In addition, Gehres also admits that no one at Sundance complained about Lyons' May 21 Facebook postings. (Tr. 99.) The record reflects that Respondent did not have any social media policy in place in 2016 or 2017 for its drivers.

6. Lyon's Termination on May 24, 2016

On May 23, at approximately 1 p.m., Lowery called Lyons and said: "Hey, we need to see you. We need you to come talk. We need you to talk to us at the office about – if you can make it at 11, we'd appreciate it." (Tr. 163, 210–211.) Lyons responded telling Lowery: "Yeah, no problem." Id. Lyons asked Lowery what the meeting was about but Lowery did not say at that time he only told Lyons "just come in, we need to talk to you." (Tr. 210–211.)

Monteiro admits speaking to Lowery before their meeting on May 24 with Lyons. Monteiro recalls that Lowery had a printout of Lyons' two May 21 private Facebook postings before the meeting.

On May 24, Lyons went to a meeting at 11 a.m. with Lowery and Monteiro. (Tr. 210.) All three of them immediately went into a main floor office and Lowery discussed a termination notice to Lyons that Lowery brought to the meeting. (Tr. 210–212.) The entire meeting lasted about 4–10 minutes. (Tr. 164, 212.)

Lowery began the meeting by saying: "We have your Facebook posts. Don't try to deny it. You said some remarks about Sundance." (Tr. 164, 212.)

Lyons responds saying he does not deny making the two May 21 Facebook postings and that working the Sundance shuttle costs Respondent's drivers a lot of money to go over there and just sit for hours. (Tr. 164, 212.)

Lowery next says to Lyons that it is going to cost you [Lyons] a lot more money because we are going to terminate you for disparaging Respondent's client Sundance and Lowery handed Lyons the termination notice he prepared that Lyons and Lowery signed and the meeting ended. (Tr. 164, 212.)

The termination notice was prepared by Lowery and says that Lyons was terminated on May 24 for:

> Gross misconduct violating standards of professionalism by posting Derogatory and demeaning comments specifically targeting ODS [Respondent] clientele and ODS [Respondent] on Social media (Facebook). Grounds for immediate dismissal. Not ok to rehire.

(Tr. 159; GC Exh. 6.) (Emphasis in original.)

Also, the Respondent's May 24 termination notice specifically states that Lyons had no prior discipline at Respondent.[14] Id. In addition, at no time during the May 24 termination meeting did Lowery or Monteiro mention any prior discipline to Lyons having too many absences, a bad attitude, being insubordinate, or being an inefficient driver as an added reason to support his May 24 termination. Finally, the termination notice provides that Lyons "has committed an action, which as stated in the company policy handbook is grounds for immediate termination." Id.

Respondent's counsel admits at hearing that: "Lyons was terminated for publicly insulting a client [Sundance]." (Tr. 72–74; see also FRE 801(d)(2) (Admissions by opposing party counsel.)

In 2017, Respondent maintained the following rule in its Causes for Termination policy which provides that:

> All employees must adhere to all policies and procedures and at any time management reserves the right to end employment relations with any employee at will for any reasonable violation of policies and procedures to include but limited to: … f. Gross misconduct or unprofessional conduct towards management and staff (the unprofessional conduct rule).

(GC Exh. 2.)

The one-page Respondent unprofessional conduct rule containing only Section "T" from Respondent's policies and procedures manual was placed in Lyons' personnel file by someone but Gehres did not discuss this policy with Lowery or Martinez at the May 23 managers' meeting and Gehres did not know who placed the 1-page unprofessional conduct rule document (GC Exh. 2) in Lyons' personnel file. (Tr. 101–103.) Gehres opined that usually the same manager who discharges an employee is the one who puts documents in an employee personnel file. (Tr. 103.)

Monteiro's first reaction to Lyons' termination after Lowery hands Lyons the termination notice is that Monteiro acts surprised and says to Lyons that she "didn't know, you know, they [Respondent and/or Lowery, in particular,] were going to terminate [Lyons]." (Tr. 213.)

Lyons was also surprised to be terminated from Respondent in this fashion. (Tr. 216.) Soon thereafter as Lyons was walking away from the meeting, Monteiro makes her second comment to Lyons offering to him that if he applies for a new job, he should list Monteiro as a reference and she would be sure to "put in a good word for [him]." (Tr. 213.)

In sum, I find that the evidence and testimony has shown that around April of 2017, Respondent changed its policy regarding Sundance so that if the driver was scheduled to drive for Sundance, they were stuck at Sundance their entire work shift and

[13] Moreover, Monteiro admits that after Lyons was terminated for complaining about Respondent's No Staging at Sundance Policy, Respondent changed its No Staging at Sundance Policy and no longer required Respondent drivers to stay at Sundance for an entire 8-hour work shift. Tr. 64–69.

[14] Manager Lowery admits that while there is evidence of Lyons being "coached" at various times during his more than 10-year career at Respondent, Lowery confidently acknowledges that "coaching" at Respondent is not any form of discipline like a verbal or written warning, suspension, or termination. Tr. 163, 168, 189. Gehres also listed verbal warnings and written warnings to employees as specific examples of forms of discipline from Respondent. Tr. 125.

could not make any other tips and could not stage and go pick up any customers from the hotels and casinos that Respondent has contracts with at that time in the interim. Consequently, in early May, Lyons and his fellow drivers complained to management about the effect this new negative change to the terms and conditions of their employment was having on their income. They received no response to Lyons' two May 5 texts to management. As a result, Lyons posted two May 21 private Facebook posts critical of Respondent's new policy at Sundance to his private Facebook friends that included Lyons' fellow employees and one manager friend Monteiro. The May 21 private posts included sarcastic references to Sundance being a morgue and a crappy place to be especially for prolonged idle time. Monteiro next showed these posts to other Respondent managers, including Lowery, who terminated Lyons for making these two private postings.

ANALYSIS

I. PRELIMINARY LEGAL ISSUES

A. Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

After consideration of their demeanors, established or admitted facts, the admitted evidence, and inherent probabilities, I find that Lyons was the more credible witness as he had a detailed recollection of the most significant facts and he testified in a sincere and calm manner without assistance from any lawyer. Moreover, Lyons was most reliable in his testimony about his prior discipline of Lowery, the common multitude of complaints from all drivers that a Sundance shuttle assignment was unfair and caused lower earnings to drivers, and that the new No Staging at Sundance Policy was in strong need of fixing by the Respondent. Also, Lyons presented a confident recollection as to the events from April and May 2017 resulting in Lyons' termination for his private complaints with other Respondent employees about Sundance assignments using Facebook.

In addition, I found Lyons to be quite believable in his demeanor that his May 21 Facebook postings were sent using his private Facebook settings so that only his small group of friends actually viewed these posts including other current and former Respondent drivers and other employees, including Monteiro. I also find Lyons quite convincing that Monteiro acted surprised that Lowery had just terminated Lyons when she attended the May 24 termination meeting and Lowery handed Lyons the termination notice.

Monteiro, Lowery, and Gehres, on the other hand, provided general denials and less than full recollection of events. Many of their responses were a product of leading questions by Respondent's legal counsel who persisted in asking leading question despite numerous admonishments at hearing. Also, much of Gehres' testimony was hearsay, narrative, and not from his firsthand knowledge or involvement which I find unreliable and I reject.[15] For example, Gehres said only Lowery and Martinez spoke at the May 23 management meeting, Monteiro explained that Lowery did all of the talking at the May 24 termination meeting, and Lowery could not recall very much detail of events in May 2017 at hearing. When in conflict with the testimony of Lyons, their testimony is generally discredited.

I also reject Gehres' testimony that Lyons had a history of bad conduct at Respondent and had a "bad attitude" as pretext and contradicted by Lowery's termination notice and his sole focus on the two May 21 private Facebook posts at Lyons' termination meeting that Lowery mistakenly believed had been made to the general public. I also find Gehres' general and extensive narrative testimony to be mostly untrue that Gehres recommended to Martinez or Lowery on May 23 that before they should decide whether or not to discharge Lyons, they should determine whether Lyons' May 21 incident is a repeating occurrence and if there are any other negative things in Lyons' personnel file that make Lyons somebody that Respondent does not want to retain as an employee going forward. (Tr. 96, 104–109.)

Gehres also says that Lyons was disciplined and written up for a radio broadcast Lyons made about Sundance in September 2015, calling Sundance passengers "deadbeats." (Tr. 125–128.) I reject this testimony as a form of discipline as it is not verified in the record and Respondent only produced personnel files of employees who were disciplined for publicly disparaging Respondent's clients and not personnel files of employees who were disciplined for having a bad attitude, for having excessive absences, for being insubordinate, or for anything other than making two May 21 private Facebook postings to fellow employees and one manager friend that sarcastically complained about Respondent's No Staging at Sundance Policy. Also, Lowery's more believable testimony was that "coaching" is not a form of discipline and neither anything mentioned to Lyons by Lowery or Monteiro at Lyons' May 24 termination meeting nor the May 24 termination notice itself make any reference to prior discipline or repeated wrongdoing by Lyons. The termination notice specifically provides that Lyons had no prior discipline before his two May 21 private Facebook postings. (See GC Exh. 6.)

Monteiro was not believable in her testimony that she did not know why Lyons was terminated as she is the one who sent Lyons' two May 21 private Facebook posts to Martinez and she also knew that Respondent was using these two Facebook posts

[15] Gehres began his employment at Respondent on September 19, 2016, and I find it reasonable that he would defer the ultimate decision of whether or not to discharge Lyons just 8 months later to Lowery for Lyons' making his two May 21 private Facebook postings since Lyons had been with Respondent for over 10 years and Lowery had a similar lengthy work history at Respondent. Tr. 95–97.

to allege that Lyons "publicly insulted" Sundance and to justify Lyons' termination on May 24. More importantly, Monteiro attended the termination meeting on May 24 with Lowery and Lyons.

Overall, I do not find Lowery to be a credible witness. He did not impress me as having sincere, forthright, or a candid demeanor; his recollection was poor and suspiciously selective; and his testimony was often conclusory, self-serving, uncorroborated, and/or undermined by the other evidence. I reject Lowery's testimony that it was a "team" decision to terminate Lyons taking in all of Lyons' past discipline history. Lowery had access to Lyons' personnel file and could have made reference to any items in it had he considered them relevant to his decision to terminate Lyons. Lowery did not inform Lyons or Monteiro of any prior discipline reasons to terminate Lyons when the termination meeting took place on May 24.

Furthermore, Respondent's position that Lyons was a bad employee for more than 10 years with a history of discipline and deserved termination is not believable as Respondent's own May 24 termination notice prepared by Lowery specifically provides that Lyons had no prior discipline. (GC Exh. 6.) Moreover, Manager Lowery made no mention of any prior discipline to Lyons at the May 24 termination meeting and Monteiro also made no mention of any prior discipline against Lyons and she would know if dispatchers complained about Lyons' subpar behavior as a driver in her role as the call center dispatch manager. More importantly, Monteiro acted surprised about Lyons' termination and told him that she "didn't know, you know, they [Respondent and/or Lowery, in particular,] were going to terminate [Lyons]." If Lyons had been a subpar or problem driver for Respondent, Monteiro would have testified to this and she would not have said this to Lyons. Furthermore, as stated above, Respondent only produced personnel files of employees who had publicly disparaged clients as this is Respondent's sole actual alleged problem with Lyons' behavior and I find that Respondent's argument through Lowery, Gehres, and its counsel that that Lyons' had a history of "other disciplinary problems" and that Respondent "looked at the whole body [of Lyons' prior discipline]" and that Lyons was a subpar employee, insubordinate, or a substandard employee in Respondent's decision to terminate Lyons is false and made-up. (Tr. 171–172, 186, 189, 191, and 261.)

As stated above, what was particularly telling to me at hearing as it relates to Respondent's own management witness credibility were the frequent leading questions asked by counsel to Respondent to all of his witnesses, including significant testimony from Monteiro, Gehres, and Lowery, despite numerous objections by the General Counsel and admonishments from me to avoid improperly having testimony from Respondent's lawyer rather than believable testimony from Respondent's witnesses' own personal knowledge. (Tr. 49–50, 64–65, 79–80, 109, 127–128, 178, 182, 191–192.) An occasional leading question is expected but the wide scope of testimony elicited from leading questions fashioned as script from Respondent's legal counsel adds credence to my finding that Respondent's multiple different explanations as to why Lyons no longer works at Respondent is pure pretext and that Respondent's counsel's proffered facts through his witnesses' multiple "yes" or "no" responses are inadmissible as evidence. See e.g. *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977) (answers to leading questions on direct examination not entitled to credence).

I also reject Gehres' testimony that the longest time that drivers would be required to sit idle at Sundance was no more than 1.5 hours as Gehres appeared flippant when he made this statement and I find it much more believable that Lyons and other drivers were required by Respondent's new No Staging at Sundance Policy to sit idle for as long as 3–4 hours waiting for a Sundance helicopter tour group to return. I also reject Gehres' opinion that Lyons' two May 21 Facebook postings were "public" as, instead, I find that these were private Facebook postings to Lyons' friends-only group and they were not made to the general public. (See Tr. 30, 73, 98–99, 105, 128, 183, 188, 261–262, 288.)

The Board recognizes the "missing witness" rule that when a party fails to call a witness is under the control of that party and who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which that witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988); *Natural Life, Inc*., 366 NLRB No. 53, slip op. at 1, fn. 1 (2018). This is particularly true where the witness is an agent of a party. *Roosevelt Mem. Med. Ctr*., 348 NLRB 1016, 1022 (2006). In this case, Respondent did not call Lyons' immediate supervisor, operations manager, and agent, Martinez, a current manager under the control of Respondent at the time of hearing, despite purportedly being authorized by Gehres, along with Lowery, to review the circumstances surrounding Lyons' May 21 private Facebook postings and to decide on Lyons' fate at Respondent with Lowery. Respondent did not produce any evidence showing that Martinez was unavailable to testify at hearing. Therefore, I draw an adverse inference against Respondent by its failure to call Martinez as a witness and find that Lowery and not Martinez or Gehres made the decision to terminate Lyons based entirely on Lyons' two May 21 private Facebook postings and not for any other motivation.

Finally, I also reject Respondent counsel's argument at hearing that Lyons was disciplined in 2015 for publicly denigrating the Sundance passengers on the radio as Respondent's counsel later contradicts this statement and admits that: "Lyons was terminated [on May 24] for publicly insulting a client [Sundance]" and no mention is made to any *prior* discipline to Lyons. Moreover, as stated above, Respondent's termination notice specifically contradicts Respondent's counsel and explicitly states that Lyons had no prior discipline before his May 21 private Facebook postings that caused his May 24, 2017 discharge. (Tr. 2–74; GC Exh. 6; see also FRE 801(d)(2) (Admissions by opposing party counsel; *Raleys*, 348 NLRB 382, 501–502 (2006) (Attorney statements made at hearing are admissions.)

B. The "Single Employer" Status Issue

Initially, it is necessary to address the issue of whether Desert Cab and ODS constitute a single employer, as contended by the General Counsel. Desert Cab and ODS both were represented by the same lawyer at the hearing. ODS and Desert Cab

answered the complaint here and admit the Board's jurisdiction over both Desert Cab and ODS and that Desert Cab and ODS discharged Lyons on May 24. (Tr. 9; GC Exh. 1(c) at 1-2; and GC Exh. 1(e) at 1-2.) In addition, the uncontroverted record establishes that the General Counsel was prejudiced by Respondent's surprise announcement at hearing that ODS rather than Desert Cab terminated Lyons and I find that Respondent waived any argument it brought to hearing that Desert Cab and ODS are not in essence a single employer. See Board Rule 102.20 (All allegations in the complaint not specifically denied or explained in an answer filed shall be deemed to be admitted to be true.)

Moreover, multiple entities may constitute a "single employer" for purposes of the Act. *Parklane Hoisery Co*., 203 NLRB 597, 612 (1973), amended on other grounds, 207 NLRB 991 (1973). Where an "arm's-length relationship" does not exist among the entities under scrutiny, the Board may find that together they constitute one employer. See *Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744 (7th Cir. 2001); *Blumenfeld Theatres Circuit*, 240 NLRB 206 (1979), enforced without opinion sub nom. *Roxie Oakland Theater v. NLRB*, 626 F.2d 865 (9th Cir. 1980) (where relationship resembled close family rather than independent companies found to be a single employer).

The Board considers four factors to determine whether two or more companies should be treated as a single employer: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv. of Mobile*, 380 U.S. 255 (1965) (per curium) (quoted with approval in *South Prairie Constr. Co. v. Operating 'Engineers Local 627*, 425 U.S. 800, 802 fn. 3 (1976)). All four factors need not be present and no one factor is controlling, although the Board considers common control of labor relations a "significant indication of single employer status." *Bolivar-Tees, Inc*. 349 NLRB 720 (2007).

Factor (1): As stated above, Desert Cab and ODS have worked together for many years and Desert Cab and ODS are sister companies who reside in the same building at the same address in Las Vegas. Both companies share the same parking lot and use the same vehicle mechanics and tools. They also share the same Desert Cab supervisors who investigate accidents at both companies and file workers compensation claims for both companies. In addition, the same lawyer represents both Desert Cab and ODS. Tr. 182, 185. Desert Cab and ODS are completely interrelated in that they are both engaged in the same business of charter and limo walk-up transportation for various Strip hotels and the shuttle service at Sundance and the Las Vegas airport.

Factor (2): As stated above, Desert Cab provides its supervisors to interchangeably work with both Desert Cab and ODS to investigate vehicle accidents and make workers compensation claims for both companies. (Tr. 182, 185.) The Board stated "common management exists where one of the nominally separate enterprises exercises actual or active control, as distinguished from potential control, over the other's day-to-day operations." *Cimato Bros*., 352 NLRB 797, 799 (2008). In *Cimato*, the Board found that there was no common management because although one individual was on the board of the company, another individual actually oversaw the day-to-day operations. Id. Here, I find that common management exists because Desert Cab's supervisors provide common management duties and active control over ODS' day-to-day operations when they respond to vehicle accidents at both companies and Desert Cab supervisors also file workers' compensation claims for both companies.

Factor (3): Common control of labor relations has been described as a critical factor.[16] In this case, these criteria clearly weigh in favor of a finding that the entities constitute a single employer. The record makes clear that Desert Cab and ODS share supervisors, workers compensation claim filing, insurance, and the same in-house attorney whose office is located in the building shared by the companies at the same address.

Factor (4): There is no evidence of common ownership of Desert Cab and ODS. However, given the lack of arm's-length dealings between the two companies as discussed in factors 1-3 above, I find that Desert Cab and ODS are a single employer even in the absence of common ownership. Therefore, I find that Desert Cab, Inc. d/b/a ODS Chauffeured Transportation and On Demand Sedan, Inc. are a single employer and are jointly and severally liable for the unfair labor practices discussed below.

II. THE UNLAWFUL DISCHARGE OF LYONS

Complaint paragraphs 4–6 allege that Respondent's May 24 discharge of Lyons was based on his protected concerted activities on May 21 when he posted two private friends-only posts on Facebook to his fellow employees, including other current Respondent drivers, that were critical of Respondent's No Staging at Sundance Policy, and, as a result, the Respondent violated Section 8(a)(1) of the Act by this action. (GC Exh. 1(c)). Respondent denies that Lyons was involved in protected concerted activity related to his termination and argues that Lyons' two May 21 Facebook postings "publicly, maliciously, and unnecessarily insulted [Respondent's] client [Sundance Helicopters]." (Tr. 14, 73, 288; R. Br. at 11). However, Respondent cites no legal authorities in its closing brief.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." Section 7 provides that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." Specifically, Section 7 protects employees' right to discuss, debate, and communicate with each other regarding workplace terms and conditions of employment.

A. General Background of Protected Concerted Activities

To be protected under Section 7 of the Act, employee con-

[16] *Naperville Ready Mix*, 242 F.3d at 744. In *Naperville*, three companies operated within a single family, had cross-financing, operated out of the same address and had similar day-to-day management which was sufficient to satisfy the single employer analysis.

duct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). In general, to find an employee's activity to be "concerted," the employee must be engaged with or on the authority of other employees and not solely by and on behalf of the employee himself. Whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The Supreme Court has observed, however, that "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems,* 465 U.S. at 835; *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB 151 (2014).

The concept of "mutual aid or protection" focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The Board has held that such a right includes employees' use of "social media to communicate with each other and with the public for that purpose." *Three D, LLC d/b/a Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014), affirmed, 629 Fed. Appx. 33 (2d Cir. 2015).

1. Lyons' 2 May 21 Private Facebook Posts are Concerted Activities.

In *Meyers I*, the Board defined concerted activity as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497. Here, I find that with the two May 21 private Facebook postings, Lyons and his fellow driver employees were engaged in concerted activity when voicing their disagreement with Respondent's new No Staging at Sundance Policy. In *Meyers II*, the Board clarified that the *Meyers I* definition of concerted activity includes cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887. The requirement that, to be concerted, activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7. In this regard, "inasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). In addition, it is well established that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Whittaker Corp.*, 289 NLRB 933, 933 (1988), quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

It is well established that wage discussions are "inherently concerted" and the Board has found these discussions to be protected, regardless of whether they are engaged in with the express object of inducing group action. *Alternative Energy Applications, Inc*., 361 NLRB 1203, 1206 fn. 10 (2014); *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992). Here, Lyons and other drivers raised the issue of earning less wages for Respondent and themselves and their disagreement under Respondent's new No Staging at Sundance Policy after 7–8 drivers were sitting idle on May 5 outside Sundance in its parking lot waiting for more than an hour for a Sundance tour group to return on a busy fight night in Las Vegas. This group of drivers was upset that they could no longer go stage at nearby hotels while waiting for Sundance passengers to return in the interim. These issues were raised in the presence of other drivers and Managers Gehres and Martinez before Lyons, for the group, sent his two May 5 texts to Managers Gehres and Martinez complaining about the No Staging at Sundance Policy and requesting management's response.

After not receiving any response from Respondent's management, Lyons—again sitting idle at Sundance on May 21—posted his two May 21 private friends-only Facebook posts to his friends including other Respondent drivers, employees, and Manager Monteiro. See Tr. 42, 45, 76, 99, 101–102, 203–208, 209, 224–226, 241–244, 248–249, 251–252; GC Exhs. 4(a)-(c), 5(a)-(c), 7(a) and 7(b).

Many of these employees responded by liking and replying to the two posts or similarly commenting with approved sarcasm toward the No Staging at Sundance Policy. (GC Exhs. 4 and 5.) Even if they did not agree with Lyons two postings, I find that the two May 21 private Facebook postings are concerted activities. Solicited employees do not have to agree with the soliciting employee or join that employee's cause for the group in order for the activity to be concerted. See *Mushroom Transportation*, 330 F.2d at 685 (Conversation between 2 employees constitutes concerted activity only if at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees.); *Circle K Corp*., 305 NLRB at 932, 933 (1991), enfd. 989 F.2d 498 (6th Cir. 1993); *Whittaker Corp.*, 289 NLRB at 934 (An employee's spontaneous remarks at a group meeting of employees gathered to hear the company's president announce that the employees' anticipated wage increases would not be forthcoming was held to be concerted activity as his statements implicitly elicited support from his fellow employees against the announced change); and *El Gran Combo*, 284 NLRB 1115, 1117 (1987), enfd. 853 F.2d 996 (1st Cir. 1988). Further, the protected, concerted nature of an employee's complaint to management is not dependent on the merit of such a complaint. See *Spinoza, Inc*., 199 NLRB 525, 525 (1972), enfd. 478 F.2d 1401 (5th Cir. 1973). In this case, however, some of the Respondent employees liked the posts at issue.

Having found that Lyons' two May 21 private Facebook postings with his coworkers and Monteiro as a Respondent manager were *concerted* activities based on the totality of the record evidence, I now turn to the issue of whether Lyons' concerted activities were engaged in for the purpose of "mutual aid or protection" under Section 7 of the Act. The Board has held that:

> an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection. This decision applies equally to cases where, as here, an employee seeks to raise that complaint directly to the employer, or, as in *Holling Press*, to an outside entity.

Fresh & Easy Neighborhood Market, Inc., supra at 157.

Lyons' two May 21 private Facebook postings are very similar to the postings in *Triple Play Sports*, 361 NLRB 308, 311 (2014), where the Board affirmed an administrative law judge who found that a similar Facebook social media discussion amongst 4 employees was *concerted* activity because it involved four current employees and was "part of an ongoing sequence" of discussions that began in the workplace about the Respondent's calculation of employees' tax withholding. Noting that the employees, in their Facebook conversation, discussed issues they intended to raise at an upcoming staff meeting as well as possible avenues for complaints to government entities, the judge also found that the participants were seeking to initiate, induce, or prepare for group action. As a result, the judge concluded that the Facebook discussion was concerted under the standard set forth in *Meyers Industries*, 281 NLRB 882, 887 (1986).

Here, Lyons' two May 21 private Facebook friends-only postings critical of Respondent's new No Staging at Sundance Policy amongst 8–9 friends including some Respondent employees, drivers, and Manager Monteiro was part of the ongoing complaints of the new No Staging at Sundance Policy that started with Lyons' May 5 group texts which had gone unanswered. In addition, Lyons' private group Facebook discussion with some of his fellow drivers on May 21 was aimed at improving the terms and conditions for all drivers and it clearly constituted concerted activity. See *Triple Play Sports Bar & Grille*, 361 NLRB 308, 308–309, 312–313 (2014) (Employees engaged in protected concerted activity by taking part in a Facebook discussion about employer's tax withholding practices). I find that these two May 21 private Facebook postings are concerted activities.

2. Lyons' 2 May 21 Private Facebook Posts are Protected Under the Act.

Also, to be protected under the Act, the activity must relate to Section 7 rights. ["S]ome concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," and "at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–568 (1978). Simply put, it is clear that Lyons' two May 21 private Facebook postings were aimed at improving the interests of employees for employees as Lyons continued to communicate the drivers' group's dissatisfaction with the Respondent's new No Staging at Sundance Policy. See *G & W Electric Specialty Co*., 154 NLRB 1136, 1137 (1965). While the drivers had complained about the lower revenue from working part of their shift at Sundance due to lower tips, the new No Staging at Sundance Policy was even more financially unpleasant to the drivers as they were now required to stay at Sundance and sit idle until a tour group returned earning no extra income they formerly earned staging at hotels in the interim.

The concept of "mutual aid or protection" focuses on the goal of the concerted activity; whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market*, supra at 4–5 citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Employee motive is not relevant to whether the activity is engaged in for mutual aid or protection. *Fresh & Easy Neighborhood Market*, supra at 6. The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees' interests as employees. Id. Although personal vindication may be among the soliciting employee's goals, that does not mean that the soliciting employee failed to embrace the larger purpose of drawing management's attention to an issue for the benefit of all of his or her fellow employees. *St. Rose Dominican Hospitals*, 360 NLRB 1130, 1133 (2014).

The Board has found Facebook posts among employees about terms and conditions of employment to be protected concerted activity. See, e.g., *Bettie Page Clothing*, 359 NLRB 777, 777 (2013); *Hispanics United of Buffalo*, 359 NLRB 368, 368 (2012). Protection is not denied because employees have not authorized another employee to act as their spokesperson. *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984).

In this case, I also find that Lyons' two May 21 private Facebook postings were for the purpose of mutual aid or protection under Section 7 of the Act because Lyons and other drivers tried to improve wage conditions at work and complained about the No Staging at Sundance Policy which meant sitting idle for much time and earning less revenue for Respondent and the drivers. These two May 21 posts were intended for, and in response to, Lyons' discussions at Sundance with other driver employees and represented the continuation of the drivers' attempt to change the No Staging at Sundance Policy, events that had begun with Lyons' May 5 unanswered texts to Respondent management. At the heart of the two May 21 postings was the drivers' criticism of this new Respondent policy which decreased drivers' wages and conveyed the message that going to Sundance to earn less revenue and sit idle was sarcastically similar to hanging out at the morgue and having a crappy day at work earning less revenue than usual. These two May 21 private Facebook postings are protected concerted activities.

3. The 2 May 21 Private Facebook Postings Never Lost Protection Under the Act.

Having found that Lyons' two May 21 private Facebook posts are protected concerted activities, I must next determine whether his posts or conduct exceeded the bounds of those protected concerted activities so that it would remove the pro-

tection of the Act. The issue is whether the remarks in Lyons' two May 21 private Facebook postings and comments and responses of Lyons' coworkers remain protected under the Act.

When an employee is discharged for conduct that is part of the res gestae of protected activities, the question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service. *Dickens, Inc,* 352 NLRB 667, 672 (2008); *Caval Tool Division, Chromalloy Gas Turbine Corporation*, 331 NLRB 858, 863 (2000); *Consumers Power Company*, 282 NLRB 130, 132 (1986); *Fitch Baking Company*, 232 NLRB 772 (1977). Employees are permitted some leeway for impulsive behavior when engaged in concerted activity, as the language of the shop is not the language of polite society. *Dreis & Krump Mfg., Inc.,* 221 NLRB 309, 315 (1975); *Phoenix Transit System,* 337 NLRB 510, 514 (2002) (even most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth; federal law gives license to use intemperate, abusive or insulting language without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point). Protection is not denied to an employee regardless of the lack of merit or inaccuracy of the employee's statements, absent deliberate falsity or maliciousness, even where the employee's language is stinging and harsh. *CKS Tool & Engineering, Inc. of Bad Axe,* 332 NLRB 1578, 1586 (2000); *Delta Health Center, Inc.*, 310 NLRB 26 (1993).

Respondent contends that Lyons' two May 21 Facebook posts "publicly, maliciously, and unnecessarily insulted a client [Sundance Helicopters]." (R. Br. 11.) I find that the two postings were not publicly made but were confined to Lyons' private friends-only Facebook group comprised of mostly his current and former friend employees at Respondent. In addition, I further find that they were sarcastic statements not intended to be taken as the truth as Sundance is not literally a morgue but as the evidence shows it can be a very quiet and dead place to be forced to sit idle as a result of Respondent's controverted No Staging at Sundance Policy. In addition, the two May 21 postings contained no profanities.

In sum, I find that both Lyons' two May 21 private Facebook postings to his fellow drivers and other employees were not so egregious as to cause them to lose the protection of the Act. I find that they were a continuation of the drivers' ongoing complaints to improve work wage conditions to change the new No Staging at Sundance Policy that began in early May when Lyons, for the group of drivers, texted Respondent's management with no response. Furthermore, I find that these two May 21 private Facebook postings are *protected* concerted activities. I also find that Monteiro and other Respondent managers had knowledge of these protected concerted activities before Lyons was terminated on May 24, 2017. Consequently, the two posts were nonpublic, contained no profanity, and did not cause a loss of reputation or business for the Respondent; and there was no disruption of Respondent's business. (Tr. 99, 289.) See *Mexican Radio Corp*., 366 NLRB No. 65, slip op. at 1 (2018) (Same).

I also do not find that the two May 21 private Facebook posts are of such character as to render Lyons unfit for further service. In addition, I find no evidence that Lyons actually intended falsity or maliciousness toward Sundance with his two posts and I further find that Lyons was making two private and sarcastic jokes to garnish sympathy from his fellow employees. These posts were never intended for public viewing and were in furtherance of the drivers' group activity that began at Sundance on a fight night on May 5 and they are the result of management having ignored Lyons' group texts to them. The two May 21 private Facebooks postings were the next step by Lyons for the group once he found himself sitting idle again at Sundance on May 21 and Respondent had still not responded to the May 5 group text.

In addition, the Board has long recognized that an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation from defamation and reckless disparagement. Section 7 rights are balanced against these interests, if and when they are implicated. In striking that balance, the Board applies these principles in accordance with the Supreme Court's decisions in *Jefferson Standard,* 346 U.S. 464 (1953) and *Linn v. Plant Guards Local 114,* 383 U.S. 53 (1966).

In *Jefferson Standard*, the Court upheld the discharge of employees who publicly attacked the quality of their employer's product and its business practices without relating their criticisms to a labor controversy. The Court found that the employees' conduct amounted to disloyal disparagement of their employer and, as a result, fell outside the Act's protection. 346 U.S. at 475–477. In *Linn*, the Court limited the availability of State-law remedies for defamation in the course of a union organizing campaign "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." 383 U.S. at 64–65. The Court indicated that the meaning of "malice," for these purposes, was that the statement was uttered "with knowledge of its falsity, or with reckless disregard of whether it was true or false." Id. at 61.

Turning to the facts of this case, I find once again that Lyons' two May 21 private Facebook postings were not publicly made and did not attack Respondent's product or its business practices without relating to a labor controversy. Instead, Lyons' two May 21 posts were a continuation of an ongoing labor controversy and was the next step to make Lyons' fellow workers aware that he was once again stationed at Sundance and sitting idle rather than earning money for Respondent and himself by staging all because of the controverted No Staging at Sundance Policy. While I find his two May 21 posts to be sarcastic jokes to make his point involving Sundance, they were not maliciously untrue or made by him with reckless disregard of whether they were true or false as his real intention in his frustrated state was to further the drivers' complaints against Respondent's No Staging at Sundance Policy.

The first prong of the *Jefferson Standard* test is not at issue here. There was an ongoing labor dispute at Respondent on May 21 when Lyons posted his two private Facebook posts. Other employees were involved at that time with the same grievance against Respondent's new No Staging at Sundance Policy. Thus, I find that there was an ongoing labor dispute at the time of Lyons' two May 21 private Facebook posts.

As to the second prong of the test, I further find that Lyons'

two posts, while being sarcastic jokes, were not "so disloyal and reckless as to lose the Act's protection" under *Jefferson Standard* and its progeny. See *MasTec Advanced Technologies*, 357 NLRB 103, 107 (2011). The two private postings jokes were about how "dead" it was to be assigned to Sundance under the new controverted policy and it did not disparage Respondent. (GC Exh. 4 and 5.) Statements are maliciously untrue and unprotected, "if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity." *MasTec*, supra at 107 (citations omitted). The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. Id. (internal quotation marks and citations omitted).

Lyons' two May 21 private Facebook posts mostly to his coworkers are not maliciously untrue and were not made by Lyons with reckless disregard for their truth or falsity as I find that Respondent has failed to present evidence establishing that the May 21 postings were maliciously untrue (i.e. were made with knowledge of their falsity or with reckless disregard for the truth or falsity). See *Triple Play Sports Bar & Grille*, 361 NLRB 308, 313. My examination of Lyons' two private posts shows that they did not exceed the standard of the Supreme Court and they continue to enjoy immunity. This standard holds that even the most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth. *Linn*, supra at 63. Under the standard set forth in *Linn* and its progeny, the Respondent has the burden to establish that Lyons' two May 21 private Facebook posts were maliciously untrue. *Springfield Library & Museum,* 238 NLRB 1673, 1673 (1979). The Respondent has not met this burden. Accordingly, I find that Lyons' two May 21 private Facebook posts did not lose protection under *Linn*.

I further find that Lyons' two May 21 posts were not so disloyal or recklessly disparaging as to lose the protection of the Act.

> In summary, the disloyalty standard is at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to a labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand, suggestions that a company's treatment of its employees may have an effect upon the quality of the company's products, or may even affect the company's own viability are not likely to be unreasonable, particularly in cases when the addressees of the information are made aware of the fact that a labor dispute is in progress. Childish ridicule may be unreasonable, while heated rhetoric may be quite proper under the circumstances. Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints. The mere fact that economic pressure may be brought to bear on one side or the other is not determinative, even if some economic harm actually is suffered. The proper focus must be the manner by which that harm is brought about.

Sierra Publishing Company v. NLRB, 889 F.2d 210, 220 (9th Cir. 1989).

Here, under the totality of facts, I find that Lyons' two May 21 private Facebook posts is best characterized as Lyons' continued efforts for a group of drivers to improve their wages or working conditions through attempts to change the new No Staging at Sundance Policy and possibly influencing a few strangers to the labor dispute and the two May 21 private posts continued the labor pursuit in a reasonable manner under the circumstances. The two posts did not involve any product disparagement unconnected to a labor dispute, breach of important confidences, or threats of violence as ways to pursue a labor dispute. Finally, Lyons' two May 21 private Facebook posts did not cause any economic harm to Respondent or loss of reputation and Gehres admits that Lyons' two postings had no negative effect on Respondent or Sundance as they only criticized Sundance and Sundance never commented to Gehres or anyone else at Respondent about Lyons' two postings. (Tr. 289.) In addition, Gehres also admits that no one at Sundance complained about Lyons' May 21 Facebook postings. (Tr. 99.) As such, I further find that Lyons' two May 21 private Facebook postings were not so disloyal or recklessly disparaging of Respondent or Sundance as to lose protection under the Act.

B. Section 8(a)(1) Standard of Review

Once having determined that the employees engaged in protected concerted activities, the analysis focuses on whether this conduct was the cause of the discipline. This is a case involving an employee who was discharged because their employer honestly but mistakenly believed that they had engaged in misconduct during the course of the protected concerted activity. The Board evaluates cases like this using the *NLRB v. Burnup & Sims, Inc*., 379 U.S. 21, 23 (1964), framework.

Under *Burnup & Sims*, an employer violates Section 8(a)(1) of the Act by disciplining or discharging an employee based on a good-faith belief that the employee engaged in misconduct during otherwise protected activity, if the General Counsel shows that the employee was not, in fact, guilty of that misconduct. *Triple Play Sports Bar & Grille*, 361 NLRB 308, 313 fn. 20.

Here, as discussed above, I find that Lyons was engaged in protected concerted activities when he made his two May 21 private Facebook postings critical of Respondent's No Staging at Sundance Policy. I further find that the General Counsel has proven that Respondent knew of Lyons' two May 21 Facebook postings no later than May 23 as Manager Monteiro herself forwarded the 2 posts to Respondent management on May 23. I further find that the General Counsel has also proven and Respondent admits that the basis for Lyons' discharge was his alleged misconduct in the course of Lyons' two May 21 protected postings. Moreover, I find that the evidence supports my further finding that Lyons was not actually guilty of the alleged misconduct because Respondent was mistaken, in fact, that Lyons' two May 21 Facebook postings were *publicly* made such that Respondent's client Sundance and the general public would become aware of Lyons' group criticism of Respondent's new policy. As discussed throughout this decision, I find that Lyons did not actually engage in the alleged misconduct

because his two May 21 postings were *private* Facebook posting to his friends-only group and not sent to the general public or Sundance. Consequently, because this is a mistake of fact case (i.e., mistaken public versus private Facebook postings), I find that under *Burnup & Sims* Respondent violated Section 8(a)(1) of the Act by discharging Lyons for his two May 21 private Facebook postings.

C. Respondent's Wright Line Defenses

Alternatively, if this case turns on Respondent's motive as argued by the parties, a *Wright Line* analysis is appropriate and I find that the Respondent violated Section 8(a)(1) of the Act when it terminated Lyons on May 24, 2017.

In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Hawaiian Dredging Construction Co.*, 362 NLRB 81, 83 (2015).

Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in an employer's adverse action. The General Counsel satisfies her initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets her initial burden, the burden shifts to the employer to prove that it would have taken the adverse action even absent the employee's protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i.e., either false or not actually relied on—the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Here, I have found that Lyons' two May 21 private Facebook postings went to Manager Monteiro who shared them on May 23 with other Respondent managers and Lyons was terminated on May 24 by Lowery.

As set forth in *Section II.A.* above, I find that Lyons engaged in protected concerted activities and Respondent was well aware of it. The third element, animus, is readily established by the close timing between Lyons' two May 21 private Facebook postings and Respondent's May 24 discharge of Lyons, and its shifting explanations for this discriminatory adverse action.

The timing of events here is also suspect and supports finding animus. The Board has long held that the timing of adverse action shortly after an employee engaged in protected activity will support a finding of unlawful motivation. *Alternative Entertainment*, 363 NLRB No. 131, slip op. at 10 (2016); *Trader Horn of New Jersey, Inc*., 316 NLRB 194, 198 (1995). Respondent tolerated Lyons's alleged bad work behavior without issuing any discipline to him until Lyons' two May 21 private Facebook posts resulted in Lyons being terminated on May 24. Here, Lyons was terminated just 3 days after his two May 21 private Facebook postings and Monteiro took them to Respondent's other managers. Once again, there was no discipline against Lyons prior to May 24 and Lyons remained a profitable good driver for Respondent who continued to bring in good miles for the company and even Manager Monteiro was surprised that Lyons was terminated on May 24.

Respondent is unable to prove Lyons had been disciplined prior to the two May 21 private Facebook postings as the termination notice signed by Manager Lowery and Lyons on May 24 provides that no prior discipline was issued to Lyons and none was orally mentioned by Lowery or Monteiro when Lyons was discharged on May 24. (Tr. 159; GC Exh. 6.) In addition, Respondent has a progressive discipline policy, and Lyons did not commit any act subject to immediate termination by May 24. Respondent's counsel admits at hearing that: "Lyons was terminated for publicly insulting a client [Sundance]." (Tr. 73; see also FRE 801(d)(2) (Admissions by opposing party counsel; *Raleys*, 348 NLRB 382, 501–502 (2006) (Attorney statements made at hearing are admissions.) As discussed above in Section B, Respondent is mistaken as Lyons' two May 21 Facebook postings were private and <u>not</u> public and they went only to his friends-only group as a continuation of the drivers' grievance against the new No Staging at Sundance Policy.

As further evidence that the Respondent discharged Lyons on May 24 for allegedly "publicly insulting a client," the Respondent's counsel did not produce any evidence of other discipline to Respondent's employees for any other reason such as having too many unexcused absences, having a bad attitude, insubordination, getting in too many accidents, or having too many incidents of prior discipline because the Respondent only produced Lyons' personnel file since he is apparently the only Respondent employee who has been disciplined for publicly disparaging a client. (Tr. 72–74.)

Shifting defenses or reasons for an employer's adverse employment action are persuasive evidence of discriminatory motive; it also serves as evidence of animus and pretext. *Lucky Cab Co*., 360 NLRB 271, 274 (2014); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999), citing *Mastercraft Casket Co*., 289 NLRB 1414, 1420 (1988), enfd. 881 F.2d 542 (8th Cir. 1989). The most believable explanation for termination at trial was that Lowery fired Lyons on May 24 mistakenly believing that Lyons had publicly disparaged Sundance which differs from other alleged reasons produced by Respondent at hearing and in his closing brief that Lyons was terminated because not only did he make two May 21 Facebook postings but Lyons was also an unproductive "subpar" employee with a bad attitude, who was frequently absent, and had allegedly publicly criticized Sundance once before and that Lyons had allegedly been disciplined for this conduct. (Tr. 172–177; R. Br. 6, 9–10.) These shifts in explanation are evidence of an unlawful motivation.

If the Respondent would have produced the personnel files of all its employees disciplined for anything other than for disparaging a client in public, the General Counsel would have been able to elucidate questions of how the Respondent treated similarly situated employees. This was not allowed by Respondent as it chose, instead, to produce only one personnel file of Lyons and he was the only employee who had been disciplined for this so no other employee personnel files were produced. (Tr. 73.)

The General Counsel has met her burden, and the burden shifts to Respondent. The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Golden State Foods Corp*., 340 NLRB 382, 385 (2003). An employer fails to meet its rebuttal burden when the evidence shows that it tolerated an employee's shortcomings until the employee engaged in protected activity. *Global Recruiters of Winfield*, 363 NLRB No. 68 (2015). The trier of fact may not only reject a witness story, but also determine that the truth is the complete opposite. *Boothwyn Fire Company No. 1*, 363 NLRB No. 191, slip op. at 7 (2016).

As previously noted, I reject Respondent's added disciplinary reasons to terminate Lyons and allegations that he was a sub-par employee who frequently missed work, had a bad attitude, and had publicly disparaged Sundance more than once as being false and pretext. Respondent also falsely contends that Lyons was malicious against Sundance with his two May 21 public Facebook postings. This too is pretext.

As referenced above, Lyons had not been disciplined at all before May 24, though he drove for Respondent for more than 10 years and was authorized and acted many years as a road supervisor before Respondent discontinued its road supervisor program in 2015.[17] Moreover, even if Respondent's reasons for discharging Lyons are not pretext, they would not satisfy Respondent's *Wright Line* burden. Substantively, the main proffered reason for Lyons's discharge is Respondent's mistaken belief that Lyons publicly disparaged one of Respondent's clients—Sundance—with his two May 21 private Facebook postings. It was not Lyons' undisciplined sub-par driving, frequent absences, unproductive nature, or bad attitude, or anything approaching a legitimate reason but, instead, Lyons and other drivers raising issues of being dissatisfied with Respondent's new No Staging at Sundance Policy that resulted in his quick termination by Lowery for Respondent on May 24. In view of the evidence here, the record does not support a finding that Respondent satisfied its defense burden. See, e.g., *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (when there is a strong showing of unlawful motivation, the respondent's defense burden is substantial).

Accordingly, the evidence does not establish that the Respondent would have discharged Lyons based solely on his undisciplined behavior as a driver prior to May 21 even in the absence of Lyons' protected concerted activities. Stated differently, because of the pretexts referenced above, Respondent does not prove that it would have terminated Lyons regardless of his protected concerted activities. Therefore, I find that Lyons's discharge was motivated by his protected concerted activities in violation of his rights under Section 8(a)(1) of the Act.

III. RESPONDENT'S UNPROFESSIONAL CONDUCT RULE WAS UNLAWFULLY APPLIED AGAINST LYONS TO RESTRICT HIS SECTION 7 ACTIVITIES

In addition, complaint paragraphs 4(d), 5, and 6 further allege that at all times the Respondent has maintained its unprofessional conduct rule and that Respondent enforced the rule against Lyons because he engaged in the two May 21 protected concerted activities comprised of his private Facebook postings, and to discourage employees from engaging in these or other concerted activities. (Tr. 10–14; GC Exh. 1(c); The General Counsel's 2nd Motion to Amend.) Moreover, I further find that Lyons was discharged under Respondent's unprofessional conduct rule and this is direct evidence that the application of this rule resulted in Lyons' discharge for his protected concerted activities and show that Respondent violated Section 8(a)(1) and restrained Lyons from exercising his right to criticize Respondent's management protected by Section 7 of the Act. (Tr. 40–41, 165, 188; GC Exhs. 2 and 6.) In addition, I further find that Respondent applied its unprofessional conduct rule unlawfully against Lyons to restrict Section 7 activities prohibiting Lyons and his fellow employees from discussing their terms and conditions of employment through use of private Facebook postings and engaging in protected concerted activities in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By applying Respondent's unprofessional conduct rule against Lyons because he engaged in his two May 21 private Facebook postings as protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

3. By discharging employee Paul Lyons because of his protected concerted activities comprised of his two May 21 private Facebook postings to fellow employees, the Respondent violated Section 8(a)(1) of the Act and interfered with, restrained,

[17] While I find that Lyons' May 21 behavior posting privately to his friends did not warrant any discipline at all, even if it did, it was still not egregious enough to warrant anything more than progressive discipline like other employees who received oral or written warnings so Lyons could be allowed to improve but Respondent rushed to discharge Lyons soon after his protected concerted activities without affording him the same progressive discipline and fabricating the reasons he no longer worked at Respondent. When compared to how Respondent treated its other drivers like Lowery, Holland, and others who made mistakes, the evidence strongly supports an inference of discriminatory motivation. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003), rev. denied 2004 WL 210675 (D.C. Cir. 2004) (inference of unlawful motive drawn from inconsistencies between the proffered reasons for disciplining employer's other actions, disparate treatment of employees with similar work records or offenses, deviations from past practice, or proximity of discipline to union activity).

and coerced Paul Lyons in the exercise of the rights guaranteed in Section 7 of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must cease and desist such practices and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having concluded that the Respondent is responsible for the unlawful discharge of employee Paul Lyons, the Respondent must offer him immediate reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. I also order that Respondent make Lyons whole, with interest, for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Also, Respondent must compensate Lyons for his search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 9 (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the Respondent shall compensate Lyons for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016). The Respondent shall also be required to expunge from its files any and all references to the discharge, and to notify Lyons in writing that this has been done and that the discharge will not be used against him in any way. The Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended[18]

ORDER

The Respondent, Desert Cab, Inc. d/b/a ODS Chauffeured Transportation and On Demand Sedan, Inc., as a single employer, in Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully applying its unprofessional conduct rule prohibiting employees from open discussion of their terms and conditions of employment and engaging in protected concerted activities;

(b) Unlawfully discharging Respondent's employees because they engage in protected concerted activities; and

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employee Paul Lyons immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make employee Paul Lyons whole for any loss of earnings and other benefits suffered as a result of the unlawful discharge against him, as set forth in the remedy section of this decision.

(c) Compensate employee Paul Lyons for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement of Board Order, a report allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and discipline of Paul Lyons and all references to any notes, memoranda, or any other written documents prepared in response to and in defense of the unemployment insurance claim filed by him at the Nevada State Department of Labor, and within 3 days thereafter, notify employee Lyons in writing that this has been done and that the loss of employment will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days from the date of this order, post at its facilities in and around Las Vegas, Nevada, copies of the attached notice marked "Appendix".[19] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall also be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 24, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, at Washington, D.C. June 22, 2018

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT enforce a rule prohibiting you from engaging in unprofessional conduct towards management and staff in response to your protected concerted activity.

YOU HAVE THE RIGHT to post comments about the terms and conditions of your employment on social media and WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT fire you because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer employee Paul Lyons immediate and full reinstatement to his former job, or if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay employee Paul Lyons for the wages and other benefits he lost because we fired him, and WE WILL make him whole.

WE WILL remove from our files all references to the discharge and discipline of Paul Lyons and all references to any notes, memoranda, or any other written documents prepared in response to and in defense of the unemployment insurance claim filed by him at the Nevada State Department of Labor and WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

DESERT CAB, INC., AND ON DEMAND SEDAN, INC.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/28-CA-199576 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.